

Item 4g **13/00803/OUTMAJ**

Case Officer **Mrs Nicola Hopkins**

Ward **Clayton-le-Woods West And Cuerden**

Proposal **Section 73 application to vary condition 2 (Code for Sustainable Homes) attached to outline planning approval 12/00941/OUTMAJ**

Location **Land North Of Lancaster Lane And Bounded By Wigan Road And Shady Lane Lancaster Lane Clayton-Le-Woods**

Applicant **Redrow Homes Ltd (Lancashire Division)**

Consultation expiry: 10 October 2013

Application expiry: 26 November 2013

Proposal

1. This application is submitted under Section 73 of the Town and Country Planning Act 1990 to vary condition 2 attached to outline planning approval 12/00941/OUTMAJ

Recommendation

2. It is recommended that this application is refused.

Main Issues

3. The main issues for consideration in respect of this planning application are:
 - Background information
 - Proposed Modification
 - Carbon Reductions
 - Section 106 Agreement

Representations

4. **Clayton le Woods Parish Council** have no comments to make

Assessment

Background Information

5. Outline planning permission was granted to Redrow Homes in November 2012 to erect up to 160 dwellings on the land with associated open space with all matters reserved, save for access. The outline approval was conditional and subject to associated planning obligations, in accordance with planning policy at that time, which included:
 - 30% affordable housing
 - On site play space

- £288,000 sustainable/public transport improvements
- A contribution, to be determined at reserved matters stage, towards primary school places

6. Condition 2 of the outline approval relates to Core Strategy Policy 27 and states:

Each dwelling hereby permitted shall be constructed to achieve the relevant code for Sustainable Homes level required by Policy 27 of the Adopted Central Lancashire Core Strategy or in accordance with national standard postdating the Core Strategy at the time of construction. The current requirements to be completed are as follows: Level 3 for all dwellings commenced from 1 January 2010, Level 4 for all dwellings commenced from 1 January 2013 and Level 6 for all dwellings commenced from 1 January 2016 and achieve 2 credits within Issue Ene7: Low or Zero Carbon Technologies. *Reason: To ensure that the development is in accordance with Policy 27 of the Adopted Central Lancashire Core Strategy.*

Relevant Planning Policy

7. Condition 2 was attached to the planning approval to ensure that the proposals accord with Policy 27 of the Adopted Core Strategy. Policy 27 states:

Incorporate sustainable resources into new development through the following measures: All new dwellings will be required to meet Level 3 (or where economically viable, Level 4) of the Code for Sustainable Homes. This minimum requirement will increase to Level 4 from January 2013 and Level 6 from January 2016. Minimum energy efficiency standards for all other new buildings will be 'Very Good' (or where possible, in urban areas, 'Excellent') according to the Building Research Establishment's

Environmental Assessment Method (BREEAM).

Subject to other planning policies, planning permission for new built development will only be granted on proposals for 5 or more dwellings or non-residential units of 500 sq metres or more floorspace where all of the following criteria are satisfied:

(a) Evidence is set out to demonstrate that the design, orientation and layout of the building minimises energy use, maximises energy efficiency and is flexible enough to withstand climate change;

(b) Prior to the implementation of zero carbon building through the Code for Sustainable Homes for dwellings or BREEAM for other buildings, either additional building fabric insulation easures,

or

appropriate decentralised, renewable or low carbon energy sources are installed and implemented to reduce the carbon dioxide emissions of predicted energy use by at least 15%;

(c) Appropriate storage space is to be provided for recyclable waste materials and composting;

(d) If the proposed development lies within a nationally designated area, such as a Conservation Area or affects a Listed Building, it will be expected to satisfy the requirements of the policy through sensitive design unless it can be demonstrated that complying with the criteria in the policy, and the specific requirements applying to the Code for Sustainable Homes and BREEAM, would have an unacceptable adverse effect on the character or appearance of the historic or natural environment.

The integration of the principles above into other types of development will also be encouraged.

8. This Policy is contained within the Central Lancashire Core Strategy which was found sound by the Planning Inspector in June 2012. In respect of Policy 27 the Inspector commented that the *evidence base is sufficiently convincing to justify the Policy in terms of requirements rather than expectations*.
9. Members may recall that the Council had a similar Policy (Policy SR1) prior to the adoption of the Core Strategy which was contained within the Sustainable Resources DPD. This was an adopted Policy and was applicable to all new housing schemes since its adoption in September 2008. This Policy was superseded when the Core Strategy was adopted however similar requirements have been required on new housing schemes for over 5 years now.
10. In order for large new housing schemes to accord with the Core Strategy Policy all of the dwellings are required to meet the specified code level dependent on when they are constructed and secure a reduction in carbon emissions over and above the relevant code level. This notwithstanding the preamble to the Policy does enable a relaxation on this requirement where the applicant can demonstrate that an individual site's circumstances are such that development would not be economically viable if the policy were to be implemented. Therefore although an applicant may not submit viability information at the application stage to justify code 4 throughout the lifetime of the development or choose to appeal the condition, which is the case in respect of this site, an applicant/ developer could still seek to vary the condition at a later date based upon the site's viability.
11. Members will be aware that other house builders/ applicants within the Borough have recently varied similar conditions in this way. The applicant however has not chosen to submit viability information in support of this application and as such the application has been determined on the merits of the submission documents.

Proposed Modification

12. Redrow Homes consider that this condition fails the tests of reasonableness, that the *commencement* should reflect the commencement of the development as a whole and not the individual plots and that the recent Housing Standards Review (August 2013) indicates that carbon and energy targets should be addressed via Building Regulations. This is explored further below. As such Redrow Homes are seeking the following amendments to the wording of the condition:

The dwellings hereby approved shall achieve Level 4 of the Code for Sustainable Homes. No dwelling shall be occupied until a final Code Certificate has been issued for that dwellings certifying that Code Level 4 has been achieved for that dwelling. *Reason: To ensure that the development is in accordance with Policy 27 of the Adopted Central Lancashire Core Strategy.*

13. Redrow Homes have also cited an appeal decision at Preston where Code Level 6 is not cited. This is explored further below.
14. Justification for varying the wording of the condition has been split, by the applicant, into four separate arguments which are explored below.

Test of Reasonableness

15. Redrow Homes consider that an onerous interpretation of condition 2 would nullify the benefit of the planning approval for any dwellings not commenced before the 1st January 2016 and is unduly restrictive in terms of the test of reasonableness in Circular 11/95. Paragraph 35 of Circular 11/95 states:

A condition may be unreasonable because it is unduly restrictive. Although a condition may in principle impose a continuing restriction on the use of land (provided that there are good planning reasons for that restriction), such a condition should not be imposed if the restriction effectively nullifies the benefit of the permission. For example, it would normally be reasonable to restrict the hours during which an industrial use may be carried on if the use of the premises outside these hours would affect the amenities of the neighbourhood, but it would be unreasonable to do so to such an extent as to make it impossible for the occupier to run the business properly. If it appears that a permission could be given only subject to conditions that would be likely to be held unreasonable by the courts then it will be necessary to refuse permission altogether.

16. The wording of the condition, as set out above effectively ensures that the commencement of the construction of any dwelling after 1 January 2016 will be required to be constructed to Code for Sustainable Homes Level 6.
17. The Council's interpretation of Policy 27 is that the Code Level to be secured is not fixed at the commencement of the development as a whole but at the commencement of each individual plot. This interpretation has also been applied by the Secretary of State and the Planning Inspector at the Wigan Road appeal (APP/D2320/A/10/2140873) where the following condition was attached:

Each dwelling hereby permitted shall be constructed to achieve the relevant Code for Sustainable Homes Level required by Policy SR1 of the Sustainable Resources DPD, or in accordance with the national standard postdating the DPD in place at the time of construction. The current requirements to be complied with are as follows; Level 3 for all dwellings commenced from 1 January 2010, Level 4 for all dwellings commenced from 1 January 2013 and Level 6 for all dwellings commenced from 1 January 2016, and achieve 2 credits within Issue Ene7: Low or Zero Carbon Technologies.

18. Members may also note that Redrow Homes, the applicant, applied to construct up to 135 dwellings at Lucas Lane, Whittle le Woods. This application was subsequently refused although allowed on appeal (APP/D2320/A/12/2172693) where the requirements of Policy 27 were considered. At the Public Inquiry Redrow Homes raised a similar argument as those put forward in respect of this application, in that the relevant Code Level should be Level 4 for all the dwellings permitted now on this development, however the Inspector disagreed with the assertion and made the following comments:

For similar reasons, conditions would be required to secure the compliance of all dwellings on the site to the relevant level of the Code for Sustainable Homes. Whilst the Appellants argued that the relevant Code Level should be Level 4 for all the dwellings permitted now on this development, Policy SR1 (which is part of the Development Plan) simply says that 'All new homes will be required to meet....' the stated levels by certain dates. The whole purpose of the Policy and the Code is to drive dwellings towards the higher levels and the fact that those dwelling started later would be to a higher standard would be a planning benefit which the developer should be perfectly able to accommodate. The condition would therefore require compliance as set out in the Council's suggested condition. With this it would be necessary to ensure there was an assessment on completion in order to show that the houses did comply with the Code. It would be for the developer to do his own pre-construction assessment to achieve this.

19. Notwithstanding the comments made by the Inspector Redrow Homes also seek to vary the wording of the condition attached by the Planning Inspector at Lucas Lane. This application (13/00804/OUTMAJ) is also included on this agenda.

20. It is not considered that condition 2 nullifies the benefit of the planning permission as the requirement to construct any dwellings commenced after the 1 January 2016 to meet Code Level 6 does not restrict the developer from constructing dwellinghouses as per the outline permission. The requirements of the condition just ensures that dwellings started later within the build period meet a higher standard of construction.

Definition of Commencement

21. The applicant considers that the commencement of the development, that being the carrying out of a material operation, in respect of the interpretation of the condition in this case would fix the code level for the site to level 4 (as development will commence in 2013/ 2014). This is based upon the consideration that the provision of infrastructure (roads, sewers etc.) common to all the dwellings will be provided at the outset.

22. Redrow argue that there is no legal basis for determining that undertaking a material operation common to all the dwellings does not constitute the commencement of all the dwellings.

23. Notwithstanding the definition of commencement of development the wording of the Policy is very specific in that the relevant Code level relates to when the dwelling commences construction. The Council interpret this to be the actual commencement of each individual plot an interpretation which was supported by 2 different Planning Inspectors and the Secretary of State. The alternative interpretation, forwarded by the applicant, would not drive dwellings towards the higher levels of construction which is the purpose of the Policy.

Policy 27: Sustainable Resources and New Development

24. The applicant considers that there is no explicit intention within Policy 27 that its requirements will be applied to each individual dwelling on a development site at the date of its actual construction. Redrow Homes consider that a more logical and practical interpretation is that the appropriate level should be fixed at the time permission is granted or first commenced. The applicant considers this is the only sensible interpretation.

25. However it is considered that the alternative interpretation, which the Council has applied on other schemes within the Borough, ensures that new large housing schemes, which will extend into 2016, contributes to the government's climate change strategy of reducing carbon emissions by greater energy efficiency in the construction and use of buildings. The Core Strategy confirms that this can be achieved by requiring new developments to be constructed to higher levels than those required by the Building Regulations. Fixing the Code for Sustainable Homes Level at the date of planning permission or when the development is first commenced would not secure the Government's or Council's objectives in respect of tackling climate change over the lifetime of the development.

Housing Standards Review (August 2013)

26. The applicants have cited the recently published Housing Standards Review (DCLG) which Redrow assert demonstrates that the Government does not see a need for the levels or separate carbon and energy targets provided by the CfSH. Redrow considers that the review will result in carbon and energy targets being set in Building Regulations as the move is made towards zero carbon homes.

27. The recently published review was a review of the building regulations framework and voluntary housing standards. It aims relates to rationalising the number of codes, standards, rules, regulations and guidance. The report was commissioned by the Secretary of State although it

does note that the findings and recommendations do not necessarily represent the views or proposed policies of the Department for Communities and Local Government.

28. The findings of the review group are out to consultation until 22 October and following the consultation, the Government will analyse responses and consider the way forward. Subject to the consultation, the current intention is to issue a National Described Standards document as soon as possible, alongside a final impact assessment, analysis of consultation responses, and the planning Policy Statement setting out how housing standards should henceforth be treated in the planning system. Additionally the Government will also be considering whether further changes may be needed to the Building Regulations, possibly to integrate elements of housing standards however this would be subject to cost benefit analysis and further consultation.
29. Notwithstanding the findings of the review any legislative changes following the consultation process are yet an unknown entity and as such it is not possible to determine the Governments direction of travel at this time. Prior to any reforms/ legislative changes this cannot be known and at this time the only way of securing the Government climate change targets is an interpretation of the Policy as set out within the originally worded condition and this report.

Central Lancashire Authorities

30. The applicants have cited a recent appeal decision at Preston council (APP/N2345/A/13/2193377) for up to 330 houses at Lightfoot Lane. In this case the Planning Inspector imposed the following condition:

The dwellings hereby approved shall achieve Level 4 of the Code for Sustainable Homes. No dwelling in any phase shall be occupied until a final Code Certificate has been issued for that dwelling certifying that Code Level 4 has been achieved for that dwelling.
31. The condition reflects the applicant's suggested proposed amendments. Whilst the Inspectors decision (Para 37) does confirm that this condition is required in the interests of reducing reliance on non-renewable energy resources there is no reference back to Policy 27 or reasoning why the level does not increase in 2016, as per the Policy wording.
32. The Case Officer for this site has confirmed that the condition attached by the Inspector was agreed by all parties. Preston Council attach conditions to approvals which sets out the Code Level at the time of the planning approval and not at the time of the commencement of the individual plots. This effectively results in all of the dwellings approved from the beginning of this year until December 2015, which are not actually constructed on sites until after January 2016, being constructed to Code Level 4 with no uplift. It also appears, from recent decisions on large housing schemes, that South Ribble also takes the same approach as Preston as their conditions only refer to Code Level 4.
33. The decisions of both Preston and South Ribble Council's appear to show inconsistency within the Central Lancashire Authorities between the interpretation of the requirements of Policy 27. However it must be acknowledged that the Inspector at the recent appeal within Preston was silent in respect of the requirements of Policy 27 whereas the Inspector at Lucas Lane referred back to Policy SR1 (as set out above this Policy formed part of the adopted DPD which were superseded by the Core Strategy and had the same requirements in respect of the Code Level) confirming that the requirements are the stated level for new dwellings at specified dates.
34. As such the interpretation that the code level relates to the commencement of the construction of each individual plot is considered to be correct.

Carbon Reduction

35. The second part of the condition, *achieve 2 credits within Issue Ene7*, directly relates to the second part of Policy 27 which requires new housing schemes (for over 5 dwellings) to demonstrate a reduction in carbon emissions over and above the code level. The requirement for Issue Ene7 this ensures the development limits CO2 emissions and running costs arising from the operation of a dwelling and its services by the specification of low and zero carbon energy sources to supply a significant proportion of energy demand.
36. Within the applicants suggested condition variation there is no mention of the requirements of this part of the Policy and this has been deleted in its entirety. However as this scheme is for more than 5 dwellings this part of the Policy is applicable.
37. Policy 27 allows developers to achieve a reduction over and above the code level either through additional fabric improvements or by the installation of decentralised, renewable or low energy sources. Issue Ene7 secures a reduction only via renewable technologies and as such the condition as worded would not allow for fabric improvements, if desired, in accordance with Policy 27.
38. The 2008 The Planning and Energy Act enabled local authorities to set policies asking for a proportion of energy used in developments in their area to be from renewable or low carbon energy sources. The second part of Policy 27 accords with this part of the Act.
39. To ensure that the development accords with both parts of the Policy and to address the suggested deletion of the reference within the originally worded condition the following additional condition could be attached to any positive recommendation which enables the developers to choose how to reduce carbon emissions in accordance with the Policy wording:

Prior to the commencement of the development a Carbon Reduction Statement shall be submitted to and approved in writing by the Local Planning Authority. The Statement shall demonstrate that either appropriate decentralised, renewable or low carbon energy sources will be installed and implemented to reduce the carbon dioxide emissions of the development by at least 15% or additional building fabric insulation measures are installed beyond what is required to achieve the relevant Code Level rating. The development shall only be carried out in accordance with the approved Carbon Reduction Statement.

Section 106 Agreement

40. If this application were to be approved a Unilateral Undertaking would be required to tie this new permission into the original obligations.

Overall Conclusion

41. The 2008 Planning and Energy Act enabled local authorities to set local plan policies for development in their area to set energy efficiency standards that exceed Building Regulations. In practice the Code is the only such standard nationally recognised. Any policies should be based on national policy and should be reasonable.
42. The Adopted Core Strategy Policy 27, which was subject to public consultation and scrutiny by an Inspector prior to adoption, sets a Code for Sustainable Home Level which is higher than Building Regulations in accordance with the above Act. It is considered that the correct interpretation of the Policy requires the relevant code level to be applied to new dwellings should be at the time of construction of each individual dwelling in order to secure the national and local climate change objectives. This view has recently been supported by a Planning

Inspector and reflected within Inspectors decisions for large housing schemes within the Borough.

43. Although it is acknowledged that the Government are seeking a review of the relationship between Building Regulations, the Code, the Planning and Energy Act 2008 and local standards any proposed changes are yet to be secured by legislative changes. At this stage the Government's position is that possible changes are only subject to consultation. As such at this time the interpretation of the Policy, as per the original condition wording, ensures a benefit is secured with a higher standard of dwelling.
44. If the condition was amended as proposed all of the dwellings would be constructed to Code Level 4. The consultation on the Housing Standards Review states that *it is acknowledged that the government has set a clear end point for strengthening Building Regulations, with the zero carbon standard the equivalent of Code level 5, with a further strengthening anticipated in 2016 of both carbon and energy targets*. These objectives are being considered separately within the 'Next steps to zero carbon homes - Allowable Solutions' consultation document which is out for consultation until 15th October. Whilst in light of this there may not be a need for levels or separate carbon and energy targets this is also still subject to consultation and consideration without any agreed legislative changes.
45. It is considered that the Policy wording is specific in respect of securing Code Level 6 for all dwellings commenced after 1 January 2016. In the case of this site the condition was attached to the decision notice on 6 November 2012 and Redrow Homes choose not to appeal the condition. Additionally it should be noted that Redrow Homes unsuccessfully argued the code level uplift requirement at the Lucas Lane appeal, the Inspector supported the Council's view and it is considered that the interpretation of the condition, requiring an the relevant code level at the time of the commencement of the individual dwellings is correct. As such the variation of the condition is recommended for refusal.

Planning Policies

National Planning Policies:

National Planning Policy Framework

Central Lancashire Core Strategy 2012

Policy 1, Policy 2, Policy 3, Policy 4, Policy 5, Policy 7, Policy 9, Policy 17, Policy 27

Adopted Chorley Borough Local Plan Review

The following policies are of relevance to this proposal:

- DC3- Areas of Safeguarded Land
- GN1- Settlement Policy – Main Settlements
- GN5- Building Design and Retaining Existing Landscape Features and Natural Habitats
- HS4- Design and Layout of Residential Developments
- HS6- Housing Windfall Sites
- HS21- Playing Space Requirements.
- TR4- Highway Development Control Criteria.

Emerging Local Plan 2012-2026

- ST4- Parking Standards
- HS1- Housing Site Allocation
- HS4A- Open Space Requirements in New Housing Developments
- HS4B- Playing Pitch Requirements in New Housing Developments
- EP1- Employment Site Allocations
- BNE1- Development Criteria for New Development

Planning History

11/00981/SCE: Request for a screening opinion under the Town and Country Planning (EIA) regulations by Fox Land & Property for Land off Wigan Road, Clayton le Woods. EIA not required

11/00990/SCE: Request for a screening opinion under the Town and Country Planning (EIA) regulations by Redrow Homes for Land off Wigan Road, Clayton le Woods. EIA not required

11/01004/OUTMAJ: Outline application for a mixed use development incorporating up to 700 dwellings, 40,000sqft of B1 office space, public house/ restaurant, convenience store, community building, single form entry primary school, public open space, highway works and associated works. (All matters reserved save for access). Pending consideration

11/01093/OUTMAJ: Outline planning application for the development of land to the east of Wigan Road for the erection of up to 160 dwellings and associated open space with all matters reserved, save for access. Refused

12/00941/OUTMAJ: Outline planning application for the development of land to the east of Wigan Road for the erection of up to 160 dwellings and associated open space with all matters reserved, save for access. (Resubmission of Application: 11/01093/OUTMAJ). Approved November 2012

Recommendation: Refuse Outline Planning Permission

Reasons

1. This variation, submitted under Section 73 of the Town and Country Planning Act 1990 (as amended), seeks to vary the Code for Sustainable Homes condition which was applied to ensure the approved scheme accords with Policy 27 of the Adopted Core Strategy. This application is not supported by a financial viability assessment which demonstrates that the site's circumstances are such that development would not be economically viable if the policy were to be implemented. As such the Code for Sustainable Homes standards apply to the scheme with an increase to Code Level 6 for all dwellings commenced after 1st January 2016 and the proposed variation would be contrary to Policy 27 of the Adopted Central Lancashire Core Strategy.